BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION, CLEANUP AND ABATEMENT ORDER NO. R2-2004-0066 ISSUED TO USA PETROLEUM CORPORATION AND GEORGE DONOVAN	**USA PETROLEUM CORPORATION'S PETITION FOR RESCISSION OF CLEANUP AND ABATEMENT ORDER NO. R2-2004-0066; REQUEST FOR STAY PENDING HEARING; REQUEST FOR HEARING** Cal. Water Code § 13320

Pursuant to California Water Code § 13320, USA Petroleum Corporation ("USA Petroleum") respectfully petitions the California State Water Resources Control Board (the "State Board") for a rescission of Cleanup and Abatement Order No. R2-2004-0066, issued by the Regional Water Quality Control Board, San Francisco Bay Region (the "Regional Board"), on August 19, 2004. USA Petroleum also requests a stay pending the opportunity to be heard on this matter.

1. Contact Information of Petitioner

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2. Action of Regional Board Being Petitioned

USA Petroleum challenges the Regional Board's issuance of Cleanup and Abatement Order No. R2-2004-0066, entitled "Cleanup and Abatement Order No. R2-2004-0066, USA Petroleum Corporation and George Donovan, for the property located at 200 Serra Way, Milpitas, Santa Clara County."

A true and correct copy of the Order is attached hereto.

3. Date of Regional Board Action

The Executive Officer of the Regional Board sent the Order by certified mail on August 19, 2004.

4. Statement of Reasons the Action Was Improper

As more fully described in the attached Memorandum of Points and Authorities, the issuance of the Order is contrary to law, an abuse of discretion, lacking in sufficient evidence, and unconstitutional. In particular:

(a) **The Order's Findings Are Insufficient.** The law requires that any order issued by the Regional Board must be based on sufficient evidence which is specifically noted in the findings. Here, the evidence and findings of fact in support of the Order are wholly insufficient and hopelessly vague. Accordingly, the issuance of the Order was an abuse of discretion by the Regional Board and should be rescinded. *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974); *Bank of America v. State Water Res. Ctrl. Bd.*, 42 Cal. App. 3d 198 (1974).

(b) **The Order's Findings Are Inaccurate.** The Order contains numerous inaccuracies. For instance, the report inaccurately states that USA Petroleum's remedial efforts to date have not reduced contamination levels. However, the current contamination levels are lower than historical concentrations and continue to decline. Kowtha Decl. ¶¶ 3-4. The report also incorrectly claims that there are water supply wells approximately 1/2-mile to the northeast. No such wells exist. Kowtha Decl. ¶ 5. Moreover, the report improperly assumes that the site needs to be cleaned to residential standards — when in fact the site has been zoned for commercial uses for years. Numerous other factual inaccuracies litter the report, including incorrect findings regarding USA Petroleum's compliance history. Since the Order is based on inaccurate findings of fact, it should be rescinded.

(c) **The Order Fails to Provide Support for its Cleanup Standards.** The Order fails to establish cleanup levels for either groundwater or soil consistent with SWRCB Resolution 92-49, Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304. In particular, Resolution 92-49 requires that cleanup level must achieve background or an alternative cleanup level that attains the lowest concentration that is economically and technologically feasible that will not exceed the applicable water quality objectives for the groundwater. Here, the Order and cleanup standards are based on the purported inability to develop the commercially-zoned

site as a residential property based on an alleged potential risk outlined in an unidentified risk assessment. Because the Order fails to meet the requirements of Resolution 92-49, it should be rescinded. *In the Matter of the Petition of Chevron Pipe Line Co.*, Order WQO 2002-002 (2002)

(d) **The Order Is Unreasonable.** Requiring a commercial-zoned property to be cleaned to residential levels is manifestly unreasonable and an abuse of discretion. USA Petroleum should not be required to meet such an onerous and unfair requirement. There must be a reasonable relationship between the conditions of the Order and the state's interest in issuing the order. (See State Water Resources Control Board Resolution No. 92-49, III.H.1.b.) In essence, there must be an essential and proportional nexus between the legitimate state interest and the cleanup level required. See, e.g., *Nollan v. California Coastal Comm.*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987) (the U.S. Supreme Court held that the California Coastal Commission's action had no essential nexus with its regulatory power and that the reasons offered by the Commission were not plausible); see, also *Dolan v. City of Tigard*, 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) (The High Court found that while an essential nexus existed, it held that there was no rough proportionality between a city's exactions and the projected impact of a project).

(e) **The Order Violates the Due Process Clause.** The issuance of the Order is arbitrary, capricious, devoid of evidentiary foundation, and in

clear violation of the law, and thus violates USA Petroleum's right to substantive and procedural Due Process as guaranteed by the U.S. and California Constitutions. (U.S. Const. Amend. 14, § 1; Cal. Const. Art. 1, § 7.)

5. Manner in which USA Petroleum is Aggrieved

The Order, which requires USA Petroleum to undertake a costly investigation and remediation of the site, is contrary to law, an abuse of discretion, lacking in sufficient evidence, and unconstitutional. The Order as it currently stands would require USA Petroleum to needlessly expend substantial sums to investigate and remediate the site to a level incommensurate with its commercial zoning. Gowtha Decl. ¶ 8.

6. Action Requested of the State Board

USA Petroleum requests that the State Board accept this Petition, stay the Order until the matter may be heard, and rescind the Order.

7. Points and Authorities

See the attached Memorandum of Points and Authorities attached hereto, the contents of which are incorporated into this Petition.

8. Copy of Petition Sent to Regional Board

A copy of this Petition was concurrently served on the Regional Board.

9. The Regional Board Did Not Hold a Hearing Prior to Issuing the Order

The Order was issued administratively by the Executive Officer of the Regional Board. Accordingly, no hearing was held. As a result, USA Petroleum has not had the opportunity of arguing any of the points raised in this Petition.

10. Request For Hearing to Present Argument and Additional Evidence

USA Petroleum hereby requests that the State Board conduct a hearing on this matter so it may consider the arguments discussed in this Petition and in the attached Memorandum of Points and Authorities.

USA Petroleum also requests the opportunity to present additional evidence at the hearing that USA Petroleum has been unable to present to the Regional Board, due to the Regional Board's administrative issuance of the Order without a hearing. This evidence includes environmental reports and analyses of the site which the Regional Board did not consider and which USA Petroleum never had the opportunity to submit. USA Petroleum will supplement the record as additional evidence comes to light.

11. Request For Stay

Pursuant to Water Code § 13321 and California Code of Regulations, Title 23, § 2053, USA Petroleum hereby requests that the Order be stayed pending resolution of this matter. If a stay is not granted there will be substantial harm to USA Petroleum as it will be required to needlessly expend significant resources and money to investigate and remediate the site to a level incommensurate with its commercial zoning. Gowtha Decl. ¶ 8. Given the numerous efforts to clean the site over the last ten years — which have been largely successful — any colorable harm to the public interest or interested persons caused by a short stay of the Order until the State

Board can hear this matter is outweighed by the gravity of harm to USA Petroleum in having to comply with the Order. Moreover, as demonstrated in the attached Memorandum of Points & Authorities, there are substantial questions of law and fact concerning the issuance of the Order.

Dated: September 17, 2004

Respectfully Submitted,

By:_____

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I. INTRODUCTION

The San Francisco Bay Regional Water Quality Control Board's (the "Regional Board") issuance of Cleanup and Abatement Order No. R2-2004-0066 (the "Order") to Petitioner USA Petroleum Corporation ("USAP") violates the law and should be rescinded or at a minimum remanded back to the Regional Board. The Order does not state any precise or specific findings, contains numerous inaccuracies, and fails to include adequate support for the designated standards. As a matter of law, USA Petroleum should not be forced to comply with this vague, directionless Order.

The Order on its face demonstrates that it was issued for an improper purpose. Apparently under pressure from the property owner, the Regional Board — without adequate investigation or advisement of the facts — issued the Order. Not surprisingly, the Order contains numerous inaccuracies. For instance, the report states that USA Petroleum's remedial efforts to date have not reduced contamination levels. Wrong. The current contamination levels are lower than historical concentrations and continue to decline. Kowtha Decl. ¶¶ 3-4. The report also claims that there are water supply wells approximately 1/2-mile to the northeast. Wrong again — no such wells exist. Kowtha Decl. ¶ 5. Numerous other factual inaccuracies litter the report. Since the Order is based on vague and inaccurate findings of fact, it should be rescinded as a matter of law.

In addition, the Order fails to establish cleanup levels for either groundwater or soil consistent with SWRCB Resolution 92-49, Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304. In particular, Resolution 92-49 requires that cleanup level must achieve background or an alternative cleanup

level that attains the lowest concentration that is economically and technologically feasible that will not exceed the applicable water quality objectives for the groundwater. Here, the Order expressly indicates the reason for the Order is the purported inability to develop the commercially-zoned property for a residential use based on an alleged potential risk outlined in an unidentified risk assessment. For this reason, too, the Order should be rescinded. *In the Matter of the Petition of Chevron Pipe Line Co.*, Order WQO 2002-002 (2002).

Further, there must be a reasonable relationship between the conditions of the Order and the state's interest in issuing the order. See State Water Resources Control Board Resolution No. 92-49, III.H.1.b (requiring that "the incremental benefit of attaining further reductions in the concentrations of constituents of concern" be weighed against "the incremental cost of achieving those reductions.") In essence, there must be an essential and proportional nexus between the legitimate state interest and the cleanup level required. See, e.g., *Nollan v. California Coastal Comm.*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994). Requiring a commercial-zoned property to be cleaned to residential levels is manifestly unreasonable and an abuse of discretion. USA Petroleum should not be required to meet such an onerous and unfair requirement.

For all these reasons, and those stated below, the Order should be rescinded and the case remanded to the Regional Board.

II. BACKGROUND

The Order concerns a site located at 200 Serra Way in Milpitas, California where from the late 1970's to approximately 1988, USA Petroleum operated a gasoline service station. The site is owned by George Donvan. Under the direction of the Santa Clara Valley Water District, which has acted as the lead agency, USA Petroleum has engaged in a long history of investigating and remediating the site. As indicated in the Order, USA Petroleum has complied

with the District's requests and its efforts have been successful in drastically reducing soil and groundwater contamination levels. Kowtha Decl. ¶¶ 2-4.

Despite USAP's diligence and compliance with the District's directives and without any prior warning, on August 19, 2004, the Regional Board, through the administrative action of its Executive Officer, issued the Order and in the process usurped the authority of the District. Prior to its issuance of the Order, the Regional Board never provided USAP an opportunity to review a draft of the Order nor respond to the Regional Board's concerns or reasons for issuing the Order. This is evident by the factual inaccuracies in the Order and the lack of clear and adequate findings. As reflected in the Order, the Regional Board's rationale for interceding and issuing the Order was its inaccurate belief, at the beckoning of the property owner, that risk associated with the site prevented its development as a residential property. This is neither factually correct nor an appropriate basis for the Regional Board to issue a cleanup and abatement order. As explained below, the site is not zoned for development as a residential property. As shown below, the Order is insufficient as a matter of law and should be rescinded.

III. LEGAL STANDARDS

A. Regional Board Authority to Issue Cleanup and Abatement Orders

Pursuant to Water Code §13304(a), a regional board may issue a cleanup and abatement order to "[a]ny person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance." Such an order may require the discharger to "clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial

action, including, but not limited to, overseeing cleanup and abatement efforts." Water Code §13304(a).

B. State Board Authority to Review Action of the Regional Board

Any aggrieved person may petition the State Board to review an action or failure to act by a regional board within 30 days of such action or failure. Water Code §13320(a). Upon finding that the action of the Regional Board, or the failure of the Regional Board to act, was inappropriate or improper, the State Board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, take the appropriate action itself, or take any combination of those actions. In taking any such action, the State Board is vested with all the powers of the Regional Board. Water Code §13320(c).

C. Standard of Review of Regional Board's Action

In reviewing actions of the Regional Board, the evidence before the State Board consists of the record before the Regional Board, and any other relevant evidence which, in the judgment of the State Board, should be considered to effectuate and implement the Water Code's policies. Water Code §13320(b). The preponderance of the evidence test is the evidentiary standard applied in civil cases and in adjudicatory proceedings before state agencies. See Evid. Code § 115; *Ettinger v. Board of Medical Quality Assurance*, 135 Cal.App.3d 853 (1982); *Skelly v. State Personnel Bd.*, 15 Cal.3d 194 (1975); *Pereyda v. State Personnel Bd.*, 15 Cal.App.3d 47, 52 (1971) (holding that "[t]he proceeding before the Board [was] a civil one, and hence the burden of proof requires...a preponderance of the evidence.").

The phrase "preponderance of the evidence" is usually defined in terms of "the greater probability of truth." 1 Witkin, California Evidence, Burden of Proof and Presumptions § 35 at p. 184 (4th ed. 2000); 8 Witkin, California Procedure, Extraordinary Writs § 286 (4th ed. 1997). Thus, the Regional Board may only issue an order for cleanup and abatement if the greater

weight of the evidence supports issuance of the order. The State Board should therefore review the Regional Board's decision to issue the Order using the preponderance of the evidence standard.

The State Board should review the Order in light of the standard of review that will be applied to its decision. A reviewing court will set aside administrative orders and regulations if "the agency has failed to sustain the burden of proof with respect to facts the reviewing court finds essential." *California Hotel and Motel Assoc. v. Industrial Welfare Commission*, 25 Cal.3d 200, 222 (1979). In reviewing actions of the Regional Board, the Superior Court will not defer to the discretion of the Regional Board, but rather exercise its own independent judgment in light of the weight of the evidence. Water Code § 13330. In particular, Water Code § 13330(d) provides that "the court shall exercise its independent judgment on the evidence in any case involving the judicial review of a decision or order of the state board issued under Section 13320, or a decision or order of a regional board for which the state board denies review under Section 13320." (Emphasis added.) As such, should this matter be brought before the Superior Court, it will find an abuse of discretion by the Regional Board if the findings are not supported by the weight of the evidence. *Strumsky v. San Diego County Employees Retirement Association*, 11 Cal.3d 28, 32 (1974). See, also, Civil Code § 1094.5(c). The weight of the evidence standard is considered to be synonymous with the preponderance of the evidence standard. *Ettinger v. Board of Medical Quality Assurance*, 135 Cal.App.3d 853, 858 (1982) (citing *People v. Miller*, 171 Cal. 649, 654 (1916).

In essence, the independent judgment rule "permits the reviewing court to take a fresh look at the facts to see if the weight of the evidence [- i.e., the preponderance of the evidence -] supports the decision." *In the Matter of the Petition of Exxon Company, U.S.A.*, Order

No. WQ 85-7 (1985). The court will not defer to the agency if it disagrees with the agency's conclusion. *Id.* Here, an independent fresh look at the facts and the weight of the evidence clearly shows an abuse of discretion.

IV. THE REGIONAL BOARD'S ISSUANCE OF THE ORDER WAS INAPPROPRIATE AND IMPROPER

A. The Order's Findings are Insufficient

1. The Order Fails to State Specific and Adequate Findings of Fact

The law requires that any order issued by the Regional Board must be based on sufficient evidence which is specifically noted in the findings. Here, the evidence and findings of fact in support of the Order are wholly insufficient, hopelessly vague, and in some cases inaccurate. Accordingly, the issuance of the Order was an abuse of discretion by the Regional Board and should be rescinded.

The first six pages of the Order contain a long, and sometimes inaccurate, history of investigation and remediation measures completed on the site by USAP. Order, p. 1-6. Much of this historical recitation is irrelevant to the issuance of the Order under the Regional Board's own rationale. More importantly, however, *the Order contains no findings relating to the current environmental condition of the site or an adequate explanation of the facts which justify the issuance of the Order.* Rather, the Order abruptly jumps from its statement of largely irrelevant facts into a conclusory discussion of the "Clean-Up Abatement Order Rationale" and the sets forth vaguely worded "Preliminary Cleanup Goals." Order, p. 6-7. USA Petroleum, and any other reader of the Order, is left to guess how the Regional Board made the leap from "evidence" to "conclusion" because no evidence pertaining to the current condition of the site nor planned development are included — except for vague and incomplete references as to the reasons for the issuance of the Order.

The Regional Board's failure to make specific findings violates the law. In *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974), the California Supreme Court held that a government entity must issue clear, specific findings which bridge the gap between evidence and conclusions:

> "[a] findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.] [¶] Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations.] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable." *Topanga*, 11 Cal. 3d at 516- 517, fns. omitted.

Numerous cases have held that insufficient findings render an administrative agency's order unenforceable. In *Bank of America v. State Water Res. Ctrl. Bd.*, 42 Cal. App. 3d 198 (1974), for instance, the State Board issued a water appropriation permit with the condition that the applicant permit public access to its recreational reservoirs. The applicant filed a petition for writ of mandate, claiming that the State Board had failed make precise and specific findings. The Court of Appeal agreed, holding that "[t]he Board, in our view, has the jurisdiction and the right to impose a condition requiring public access *but only for precise and specific reasons founded on tangible evidence*." *Bank of America*, 42 Cal. App. 3d at 213 (emphasis added); see

United States v. State Water Res. Ctrl. Bd., 182 Cal. App. 3d 82, 143 (1986) (court held that the State Board's findings were inadequate because of lack of factual analysis).[1]

Here, as in *Bank of America*, the Regional Board failed to state "precise and specific reasons" for the issuance of the Order. Instead, the Regional Board drafted a long, rambling history of the remediation efforts completed on the Property but then leaped — without any supporting findings of fact — to its conclusion that an Order was required. The law does not permit the Regional Board to play fast and loose with the rules. The Order should be rescinded with instructions to the Regional Board to make proper findings.

[1] *See, also, Glendale Memorial Hosp. & Health Ctr. v. State Dept. of Mental Health*, 91 Cal. App. 4th 129, 140 (2001). In *Glendale Memorial*, a hospital brought a petition for writ of mandate against the Department of Mental Health. The hospital argued that the Department had issued several administrative decisions denying the hospital Medi-Cal reimbursements without making clear findings. The Court of Appeal agreed with the hospital and remanded the matter back to the Department with orders to issue more specific findings. (*Glendale Hospital*, 91 Cal. App. 4th at 142-143.) The Court specifically noted that the findings lacked any clear direction which might enable the hospital to comply in the future:

> "This case cries out for findings that contain far greater detail than DMH's boilerplate rejections of Hospitals' appeals for failure to 'substantiate that [a] patient met the medical necessity requirements found in Section 1774....' For example, we can glean from the administrative record on patient R.D. that County and DMH differ in their assessment of the type of suicidality that is required to demonstrate danger to self under section 1774, subdivision (a)(2)(B)(1). *What the record and counsel fail to address is that no standard has been provided for resolving this difference that would create a benchmark by which Hospitals could make informed decisions about what services they may reasonably expect to be covered by the MHP, and by which we could conduct meaningful judicial review.*" *Glendale Hospital*, 91 Cal. App. 4th at 140 (emphasis added).

2. There Are Numerous Factual Inaccuracies in the Findings

Not only is the Order fatally vague, but it also contains numerous factual inaccuracies further demonstrating the Regional Board's misguided effort to issue the Order:

- Inaccuracy No. 1 — The Regional Board claims that "to date remedial efforts have not resulted in reducing the residual contamination levels." Order, p. 1-2.

  Fact: The current contamination levels are lower than historical concentrations and continue to decline. Kowtha Decl. ¶ 3-4.

- Inaccuracy No. 2 — The Regional Board assumes that the Site can host residential development. Order, ¶¶9 and 12(c).

  Fact: The City of Milpitas' *Mid-Town Specific Plan* only allows for development of the site for *general commerical* use, which it defines as "retail sales, and personal and business services accessed primarily by automobile." Duchesneau Decl. ¶ 3.

- Inaccuracy No. 3 — The Regional Board asserts that the nearest water supply well is located approximately ½-mile to the northeast.

  Fact: There are no water supply wells ½-mile to the northeast. Kowtha Decl. ¶ 5.

- Inaccuracy No. 4 — The Regional Board's "Summary of Late Remediation Related Reports" (Order, p. 6) contends that USA Petroleum failed to submit several reports on time (including one unidentified report it describes as "Unknown").

  Fact:

  - The Corrective action plan due November 3, 2000 was sent on such date. Kowtha Decl. ¶6.

- The Corrective Action Plan due February 28, 2003 was submitted on-time on March 3, 2003 pursuant to an extension approved by the District. Kowtha Decl. ¶ 6.
- The status report due June 6, 2003 and alleged to be over 370 days late was prepared and submitted in a timely manner. USA Petroleum submitted a letter on May 23, 2003 (via email to Mr. George Cook, Santa Clara Valley Water District) in lieu of the first status report. Four subsequent status reports were submitted in all (dated July 15, 2003, August 18, 2003, September 11, 2003, and November 7, 2003). Pursuant to the approval of the District, status reports were discontinued as of November 10, 2003. Kowtha Decl. ¶ 7.

The Regional Board's incorrect recitation of facts about (1) the contamination levels existing on the site; (2) the need for the City of Milpitas to develop the property for residential uses; (3) the existence of water wells within a 1/2 mile of the site; and (4) USAP's compliance history demonstrate the Regional Board has not met its burden for issuing the Order. Because the Order was based on factually inaccurate assumptions, it should be rescinded, or at a minimum remanded to the Regional Board.

B. The Order Fails to Provide Support for its Cleanup Standards

The Order appears to improperly require USAP to cleanup the site to residential standards while the site is located in an area limited to commercial uses. The expressed rationale of the Order provides that "a recent risk assessment indicates that the risk associated with the site prevents site development . . . [cleanup] efforts have not resulted in reducing the risks to human health to a level acceptable to allow site development activities to proceed." (Order, ¶9, pp. 6-7.)

Neither the risk assessment or the planned site development is identified in the Order, a fatal flaw for the reasons identified above. The risk assessment appears to be a report (dated July 2003) referred to on page 4 of the Order, which the Regional Board failed to indicate was prepared by the property owner, and evaluates the risk based upon improper residential standards. Moreover, the preliminary cleanup goals stated in the Order require USAP "to reduce soil gas concentrations . . . to prevent excessive health risk to a future *residential* receptor from potential indoor-air impacts." Order, ¶12 (emphasis added). This ignores the fact that the property has long been zoned for commercial uses and the future plans for the area are limited to commercial uses as indicated in the City of Milpitas' Midtown Specific Plan. Duchesneau Decl., Exh. A. At present, no monitoring wells at the Site have levels of contamination above commercial-based Site-Specific Target Levels (SSTLs) . Kowtha Decl. ¶¶ 3-4. Accordingly, the cleanup standard relied upon by the Regional Board is inconsistent with Resolution No. 92-49 and do not bear a reasonable relationship with the state's interests.

1. The Order is Inconsistent with SWRCB Resolution 92-49

The Order fails to establish cleanup levels for either groundwater or soil consistent with SWRCB Resolution 92-49, Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304. In particular, Resolution 92-49 requires that cleanup level must achieve background or an alternative cleanup level that attains the lowest concentration that is economically and technologically feasible that will not exceed the applicable water quality objectives for the groundwater. Here, the Order expressly indicates the reason for the Order is the purported inability to develop the property, nothing with respect to groundwater but rather an alleged potential risk outlined by an unidentified risk assessment. As amply demonstrated by the Order's recitation of the efforts to remediate the site, while background levels are unlikely to be achieved neither is it necessary under the circumstances to

remediate the property to residential standards (Order ¶ 12). It is not necessary under the circumstances to protect human or other potential biological receptors.

In the Matter of the Petition of Chevron Pipe Line Co., Order WQO 2002-002 (2002) is instructive. There, Chevron contended that the Regional Board overestimated the threat of waste in soil to the groundwater because the Regional Board relied on a "leaching potential analysis" instead of actual data for the site. The State Board agreed, and held that:

> "The record does not provide sufficient information for the State Board to determine the appropriate cleanup level for soil. Therefore, this Order remands the matter back to the Regional Board *to determine site-specific cleanup levels* for soil based on the uses to be protected . . . ." *Chevron*, Order WQO 2002-002, p. 10-11 (emphasis added).

Here, as in *Chevron*, the Order fails to contain any findings relating to the current environmental condition of the site and does not specify or adequately demonstrate that the referenced risk assessment and planned development it relies upon as part of its rationale in issuing the Order warrant the cleanup levels. As a result, it is impossible to determine whether the site requires additional remediation. Thus, as in *Chevron*, the matter should be remanded back to the Regional Board. See also *Glendale Memorial Hosp. & Health Ctr. v. State Dept. of Mental Health*, 91 Cal. App. 4th 129, 140 (2001) (court held that where an administrative agency's findings are not adequate, an appropriate remedy is to remand the matter so proper findings can be made).

Accordingly, it is an abuse of discretion for the Regional Board to apply residential cleanup standards to a property that is zoned commercial and it has failed to provide adequate support justifying the residential standards are appropriate for the Site.

2. The Order Fails to Demonstrate a Reasonable Relationship Between the Cleanup Standard and the State's Interest

There must be a reasonable relationship between the conditions of the order and the state's interest in issuing the order. (See State Water Resources Control Board Resolution No. 92-49, III.H.1.b.) In essence, there must be an essential and proportional nexus between the legitimate state interest and the cleanup level required. Because the Order requires USAP to clean the site to residential standards even though the site is zoned for commercial uses, it fails to meet the essential and proportional nexus test mandated by law. *Nollan v. California Coastal Comm.*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987) (the U.S. Supreme Court held that the California Coastal Commission's action had no essential nexus with its regulatory power and that the reasons offered by the Commission were not plausible). See, also *Dolan v. City of Tigard*, 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) (The High Court found that while an essential nexus existed, it held that there was no rough proportionality between a city's exactions and the projected impact of a project).[2] Requiring a commercial-zoned property to be cleaned to residential levels would fail both the essential nexus test and the roughly proportional test. USA Petroleum should not be required to meet such an onerous and unfair requirement.

C. The Order Violates USA Petroleum's Constitutional Rights

For the reasons indicated above, the issuance of the Order is arbitrary, capricious, devoid of evidentiary foundation, and in clear violation of the law, and thus violates USA Petroleum's

[2] The California Supreme Court had an opportunity to apply *Nollan* and *Dolan* to a mitigation fee case in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). There, Ehrlich owned property in Culver City on which he ran a private tennis club and gym. Business slowed down, and Ehrlich applied for a permit to develop condominiums on the property. Culver City eventually approved Ehrlich's permit, but required a payment of $280,000 as a "recreation fee" to defray the costs of replacing Ehrlich's private tennis courts and other facilities. Ehrlich brought suit, claiming the recreation fee was a taking, and the case made its way to the Supreme Court. The Court held that there was an essential nexus between the recreation fee and Ehrlich's development, but found that the City had failed to provide evidence that the $280,000 fee was "roughly proportional" to Ehrlich's development. (*Ehrlich*, 12 Cal. 4th at 883.)

right to substantive and procedural Due Process as guaranteed by the U.S. and California Constitutions. (U.S. Const. Amend. 14, § 1; Cal. Const. Art. 1, § 7.)

Due process requires (a) notice of the proposed action, (b) *the reasons therefor*, (c) a copy of the charges and materials on which the action is based, and (d) the right to respond to the authority initially imposing the order. See *Burrell v. City of Los Angeles*, 209 Cal.App.3d. 568, 581 (1989) (citing *Williams v. County of Los Angeles*, 22 Cal.3d 731, 736-737 (1978). USA Petroleum has not been given the "reasons" for the Regional Board's Order in violation of the due process clause. Instead, USA Petroleum is left to guessing (1) what the real reasons were for the Order, and (2) what standards must the site be cleaned up to.

A reviewing court will set aside administrative orders if "affected persons have had insufficient opportunity to know and to meet important facts the agency has considered, or...the agency's statement of basis and purpose of the rules is unduly vague or is not firmly supported by facts in the rulemaking record." *California Hotel and Motel Assoc.*, 25 Cal.3d 200, 222 (1979). Because the Order is fatally vague and gives no clear indication as to what standard USA Petroleum must clean the site, the Order violates USA Petroleum's right to due process and should be rescinded or at a minimum remanded back to the Regional Board.

V. CONCLUSION

For the above reasons, Goodrich respectfully requests the Order be stayed pending a hearing and rescinded by the State Board.

Dated: September 17, 2004

Respectfully Submitted,

By:_____

Peter R. Duchesneau (Cal. Bar No. 168917)
Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
(310) 312-4000
Counsel for Petitioner
USA Petroleum Corporation

40793579.1

ORDER

* 10

California Regional Water Quality Control Board

San Francisco Bay Region

Terry Tamminen
Secretary for
Environmental
Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
http://www.swrcb.ca.gov/rwqcb2

Arnold Schwarzenegger
Governor

CAD

Date: AUG 1 8 2004
File No: 43-3120 (BGS)

Certified Mail No.
7003226000021259532 5

USA Petroleum Corporation
Attn: Mr. Charles Miller
30101 Agoura Court, Suite 200
Agoura Hills, CA 91301

Certified Mail No.
7003226000021259533 2

Mr. George Donovan
P.O. Box 11100
Oakland, CA 94611

SUBJECT: Transmittal of Cleanup and Abatement Order for the Property at 200 Serra Way, Milpitas, Santa Clara County

Dear Gentlemen:

Enclosed is a copy of Cleanup and Abatement Order No. R2-2004-0066 for the subject site, issued administratively by the Executive Officer under authority granted by the Board.

If you have any questions concerning this letter, please contact Barbara Sieminski of my staff at (510) 622-2423, bgs@rb2.swrcb.ca.gov.

Sincerely,

Bruce H. Wolfe
Executive Officer

Enclosure: Order No. R2-2004-0066

cc:
Mr. George Cook
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

Mr. Stephen J. Carter
Stratus Environmental, Inc.
3330 Cameron Park Drive, Ste 550
Cameron Park, CA 95682

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

CLEANUP AND ABATEMENT ORDER NO. R2-2004-0066

USA PETROLEUM CORPORATION AND GEORGE DONOVAN

for the property located at

200 SERRA WAY
MILPITAS, SANTA CLARA COUNTY

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter Board), finds that:

1. **Site Location**: The Site is located at 200 Serra Way, Milpitas, Santa Clara County in the Serra Shopping Center adjacent to Penitencia Creek. The site comprises approximately 0.44 acres. The site is zoned as commercial but currently undeveloped. Residences are located on adjacent properties to the southwest.

2. **Site History**: Currently, the subject site is an undeveloped lot included in the City of Milpitas Redevelopment Agencies Mid-Town Specific Plan. Formerly, the site was occupied by USA Petroleum Service Station No. 102. USA Petroleum Corporation began operating the service station at the site in the late 1970s. The site previously contained three 10,000-gallon gasoline underground storage tanks (USTs). The USTs were installed as single-walled bare steel unlined structures with no cathodic protection. The USTs reportedly were lined in 1994. The three USTs were removed in August 1998.

   On August 21, 1984, fuel was observed seeping into an unlined portion of Penitencia Creek next to the Site and was reported to the Milpitas Fire Department (MFD). On February 22, 1988, the MFD responded to a report of gasoline in Penitencia Creek adjacent to the Site. The MFD identified a defective gasket on the regular unleaded UST fill pipe as the cause of the release. The release of hydrocarbons from the UST appeared to have traveled along a storm drain system to Penitencia Creek. On April 16, 1992, a UST failed a leak detection test (0.02 gallon per hour). On May 20, 1993, an employee of USA Car Wash was observed washing down the island bays around the gasoline pumps, allowing the wash water to enter a storm drain inlet. The storm drain outfall, which emptied into Penitencia Creek, was tested and revealed traces of gasoline and antifreeze. On March 17, 1994, two USTs failed a leak detection test: the system appeared to be leaking at a rate of 0.4 to 0.6 gallon per hour. Multiple soil and groundwater investigations have been conducted at the site since 1984, that confirmed that soil and groundwater beneath the site have been significantly impacted by fuel hydrocarbons. Remedial action conducted at the site included several soil excavation events, groundwater extraction, floating product removal, and placement of oxygen release compound (ORC) socks in wells. However, to date remedial efforts have not

resulted in reducing the residual contamination to the levels acceptable for site redevelopment.

3. **Named Dischargers**: USA Petroleum Corporation is named as a discharger as the tank operator during the time of the activity that resulted in the discharge. Mr. George Donovan is named as a discharger as he is the current property owner.

   If additional information is submitted indicating that other parties caused or permitted any waste to be discharged on the Site where it entered or could have entered waters of the State, the Board will consider adding those parties to this Order.

4. **Regulatory Status**: This site is currently not subject to Board order. This site is currently under regulatory lead oversight of the Santa Clara Valley Water District's Local Oversight Program.

5. **Site Hydrogeology**: The Site is located within the confined zone of the Santa Clara Valley Groundwater Basin, about two miles southeast of the of San Francisco Bay at an approximate elevation of 16 feet above mean sea level. As determined by United States Environmental Protection Agency Drastic Methodology, the site is located in a medium to high sensitivity groundwater zone. Groundwater in the first water bearing zone ("A-Zone") is encountered at approximately 7 to 9 feet below grade. This zone is generally unconfined. A-Zone groundwater has been documented to flow to the northeast. First encountered groundwater in the A-Zone appears to be present in a clayey sand to silty gravel layer that extends from approximately 7 to 15 feet below grade. A deeper water bearing zone ("B-Zone") is present in a silty sand layer extending from approximately 20 to 35 feet below grade.

6. **Remedial Investigation:** Four soil borings (B-1 through B-4) were completed adjacent to the USTs in August 1984. These borings were reportedly converted to monitoring wells. Total Petroleum Hydrocarbons (TPH) were detected at concentrations up to 1,500 ppm in soil samples; analysis for Benzene, Toluene, Ethylbenzene, and total Xylenes (BTEX) was not performed. TPH and BTEX were not detected in groundwater samples collected from borings B-1 and B-2.

   Four monitoring wells (MW-1 through MW-4) were installed in February 1987 as part of a Phase II Environmental Site Assessment. TPH was detected in soil samples at concentrations up to 27 ppm; analysis for Benzene, Toluene, Ethylbenzene, and total Xylenes (BTEX) was not performed. Groundwater samples reportedly contained up to 2,000 ppb of Benzene.

   A soil vapor survey was conducted at the site in March 1988. Benzene was detected in soil vapor samples at concentrations up to 2,789 ppm. Based on the results of this survey, monitoring wells MW-5 and MW-6 were installed in May 1988. TPH was detected at concentrations up to 19 ppm; soil samples were not analyzed for BTEX. Groundwater

samples contained TPH and Benzene at concentrations up to 25,700 and 372 ppb, respectively.

Five soil borings were drilled, and three monitoring wells (MW-7 through MW-9) were installed at the site in April 1991. Soil samples contained up to 1,300 ppm TPH and 8.7 ppm Benzene. Free product was observed in monitoring well MW-1 in April 1991 (amount not reported) and MW-8 (0.04 feet) in December 1992.

A piping leak was reported beneath a dispenser in February 1992. A soil sample collected beneath the dispenser contained 250 ppm TPHG and 4 ppm Benzene.

Borings HA-1 through HA-3 were drilled, and monitoring well MW-10 was installed at the site in April 1995. Soil samples collected during this investigation contained TPH and Benzene at concentrations up to 8,800 and 27 ppm, respectively.

In November 1997, groundwater beneath the site was analyzed for MTBE for the first time. MTBE was detected at concentrations up to 1,400 ppb in well MW-1.

In April 1998, depth discrete sampling was performed in monitoring wells MW-1, MW-3, MW-5, MW-6, MW-8, and MW-9. These wells were screened in both the A and B water bearing zones. The results of this testing did not provide evidence of vertical migration at the site, with concentrations relatively constant across the well screens.

In September and October 1998, an investigation to assess the lateral and vertical extent of petroleum hydrocarbon impact to soil and ground water was performed. 23 soil borings (G1 through G18 and GP-5 through GP-11) were advanced on-Site and in the vicinity of the property. Information on the results of this sampling was not available. Additionally, monitoring wells MW-1, MW-4, and MW-7 were destroyed.

In March 1999, three nested wells (MW-11 through MW-16), screened at two different depths, were installed to the east of Penitencia Creek. Soil and ground water samples collected during drilling operations did not contain petroleum hydrocarbons above laboratory detection limits.

In December 1999 and March 2000, soil borings *HB-1 (as identified in the consultant report), HB-1 through HB-7, SB-1, SB-2, IB-1, and IB-2 were drilled at the site to assess residual contamination along the storm drain, and borings EB-1 and EB-2 were drilled to assess the backfill of the UST excavation. Monitoring wells MW-17 through MW-23 and extraction wells EX-1 and EX-2 were installed. Soil samples collected from backfill surrounding the storm drains during the installation of these wells and borings contained TPHG, Benzene, and MTBE at concentrations up to 3,500 ppm, 15 ppm, and 6.2 ppm, respectively. Free product was noted in soil samples collected from boring SB-2.

Groundwater samples collected from these wells and borings contained TPHG, Benzene, and MTBE at concentrations up to 20,000 ppb, 1,500 ppb, and 270 ppb, respectively.

In September 2000, monitoring wells MW-24 through MW-30 were installed. Soil samples collected during the installation of these wells contained up to 2,500 ppm TPHG, 0.61 ppm Benzene, and 0.027 ppm MTBE. Groundwater samples collected from these wells contained up to 65 ppb TPHG, 3,000 ppb Benzene, and 470 ppb MTBE. No other fuel oxygenates or additives were detected in soil or groundwater.

In November 2000, a Risk Based Corrective Action (RBCA) Plan was prepared. The risk assessment was based on the assumption of commercial use. The results of this assessment indicated that approximately 10% of the site still contained residual contamination at levels that posed an unacceptable risk.

In June and July 2001, monitoring wells MW-2, MW-3, MW-5, MW-6, MW-23, MW-24, MW-27, MW-28, EX-1, and EX-2 were destroyed. These wells were destroyed to facilitate over-excavation activities at the site.

In February 2001, horizontal monitoring well HW-1 and horizontal borings HB-9, HB-10, and HB-11 were installed beneath Penitencia Creek. TPHG and Benzene were detected in soil samples at concentrations up to 9 and 0.046 ppm, respectively. TPHG was detected in groundwater at a concentration of 320 ppb. Fuel oxygenates were not detected in soil or groundwater.

In November 2001, monitoring wells MW-31 through MW-34 were installed and monitoring wells MW-8, MW-9, and MW-10 were destroyed. Soil samples collected during the well installation activities contained TPHG, Benzene, and MTBE at concentrations up to 52, 0.011, and 0.030 ppm, respectively.

In March 2003, free product (sheen) was observed in well MW-25. This is the last reported observation of free product at the site.

In July 2003, soil borings B-1 through B-6 were installed to collect soil, soil vapor, and groundwater samples. Soil samples contained TPHG, Benzene, and MTBE at concentrations up to 1,500 ppm, 3.2 ppm, and 0.67 ppm, respectively. Soil vapor samples contained TPHG, Benzene, and MTBE at concentrations up to 43,000 ppbv, 910 ppbv, and 11 ppbv, respectively. Groundwater samples contained TPHG, Benzene, and MTBE at concentrations up to 1,400,000 ppb, 5,500 ppb, and 720 ppb, respectively. The results of this sampling were used in the preparation of a risk assessment. The risk assessment indicated that the residual contamination at the site poses an unacceptable risk to human health for residential use.
In April 2004, monitoring wells MW-11 through MW-16, located off-site, were destroyed. These wells were destroyed after approximately 3.5 years of monitoring data indicating that groundwater has not been impacted at these wells.

Summary of Late Remedial Investigation Related Reports

Report Name	Date Requested	Due Date	Date Submitted	Days Late
Fourth Quarter 2000 Groundwater Monitoring Report	15-Aug-00	31-Jan-01	1-Feb-01	1
Fourth Quarter 2001 Groundwater Monitoring Report	15-Aug-00	31-Jan-02	4-Mar-02	32
First Quarter 2002 Groundwater Monitoring Report	15-Aug-00	30-Apr-02	28-May-02	28
Second Quarter 2002 Groundwater Monitoring Report	15-Aug-00	30-Jul-02	5-Aug-02	6
Third Quarter 2002 Groundwater Monitoring Report	15-Aug-00	31-Oct-02	21-Nov-02	21
Fourth Quarter 2002 Groundwater Monitoring Report	15-Aug-00	31-Jan-03	7-Feb-03	7
First Quarter 2003 Groundwater Monitoring Report	15-Aug-00	30-Apr-03	6-May-03	6
Third Quarter 2003 Groundwater Monitoring Report	15-Aug-00	31-Oct-03	14-Nov-03	14

7. **Interim Remedial Measures**: In October 1993, a ground water extraction system was installed and started up in February 1994. Well MW-1 was used for groundwater extraction until pure product was observed in that well in April 1994. Ground water pumping was discontinued from that well due to the presence of pure product; ground water extraction was switched to MW-6. The system reportedly was taken off-line in November 1994. The average ground water extraction rates for MW-1 and MW-6 were 0.6 and 1.0 gallon per minute, respectively. The system reportedly removed approximately 125 pounds of TPHG from the approximately 138,000 gallons of groundwater that was extracted. Approximately 3 to 5 gallons of free product was bailed from monitoring well MW-1, but no records of this removal were kept.

   In August 1998, the three USTs were removed from the Site. During the removal activities, approximately 1,350 cubic yards of contaminated soil and approximately 49,000 gallons of

contaminated groundwater were removed and disposed off-Site. During the UST removal, three shallow soil vapor monitoring wells were removed.

In December 1999, an additional 1,100 cubic yards of contaminated soil were over-excavated from the former tank complex area. Approximately 40,000 gallons of contaminated ground water also were removed and disposed off-Site.

In May 2000, an aquifer pumping test, soil vapor extraction, and dual phase extraction tests were performed to evaluate the technical feasibility of ground water and soil vapor extraction and treatment. The tests concluded that dual phase extraction was a viable remedial alternative

In July 2001, approximately 2,500 tons of additional contaminated soil was over-excavated from the site. Approximately 5,000 gallons of contaminated ground water also were removed and disposed off-site.

In June 2003, interim groundwater remediation was initiated. The interim remediation system consisted of tri-weekly batch extraction from wells MW-19, MW-21, MW-25, MW-31, and MW-33 and the placement of ORC socks in wells MW-17, MW-19, MW-21, MW-32, and MW-33. The interim remedial activities were ceased in August 2003. During this three month period, approximately 19,100 gallons of groundwater were extracted, removing approximately 4.55 pounds of TPHG, 0.11 pounds of Benzene, and 0.03 pounds MTBE.

Summary of Late Remediation Related Reports

Report Name	Date Requested	Due Date	Date Submitted	Days Late
Unknown	12-Nov-97	16-Mar-98	6-Jul-98	112
Corrective Action Plan	19-Sep-00	3-Nov-00	6-Nov-00	3
Corrective Action Plan	25-Nov-02	28-Feb-03	6-Mar-03	6
Status Report	9-May-03	6-Jun-03		370+

Adjacent Sites: The closest known fuel leak site located in the vicinity of the site is the Texaco site at 92 Serra Way. The Texaco site is a closed leaking underground storage tank (LUST) site located approximately 500 feet to the northeast.

Clean-Up Abatement Order Rationale: The site is included in the City of Milpitas' Redevelopment Agencies Mid-Town Specific Plan. Approximately 20 years have elapsed since the discovery of a fuel release at the facility. A recent risk assessment indicates that the risk associated with the site prevents site development, even after several significant remediation efforts. Due to the City of Milpitas' and property owner's need to develop the

site, the District has issued letters requesting clean-up of the site. The Responsible Party has complied with these requests, performing over-excavation and interim groundwater extraction. However, these efforts have not resulted in reducing the risks to human health to a level acceptable to allow site development activities to proceed.

10. **Basin Plan**: The Board adopted a revised Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) on June 21, 1995. This updated and consolidated plan represents the Board's master water quality control planning document. The revised Basin Plan was approved by the State Water Resources Control Board and the Office of Administrative Law on July 20, 1995, and November 13, 1995, respectively. A summary of regulatory provisions is contained in 23 CCR 3912. The Basin Plan defines beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater.

    The potential beneficial uses of groundwater underlying and adjacent to the site include:

    a. Municipal and domestic water supply
    b. Industrial process water supply
    c. Industrial service water supply
    d. Agricultural water supply

    Groundwater underlying the site is used for the above purposes. The nearest water supply wells are located approximately ½-mile to the northeast (downgradient from the site).

11. **State Water Board Policies**: State Water Board Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality of Waters in California," applies to this discharge and requires attainment of background levels of water quality, or the highest level of water quality which is reasonable if background levels of water quality cannot be restored. Cleanup levels other than background must be consistent with the maximum benefit to the people of the State, not unreasonably affect present and anticipated beneficial uses of such water, and not result in exceedance of applicable water quality objectives. This order and its requirements are consistent with Resolution No. 68-16. State Water Board Resolution No. 92-49, "Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304," applies to this discharge. This order and its requirements are consistent with the provisions of Resolution No. 92-49, as amended.

12. **Preliminary Cleanup Goals**: The dischargers will need to make assumptions about future cleanup standards for soil and groundwater, in order to determine the necessary extent of remedial investigation, interim remedial actions, and the draft cleanup plan. Pending the establishment of site-specific cleanup standards, the following preliminary cleanup goals should be used for these purposes:

    a. Groundwater: The secondary maximum contaminant level of 5 ug/l for MTBE is the cleanup goal. The clean up level for Benzene shall be the State of California

Maximum Contaminant Level (MCL) of 1 ppb. The clean up level for TBA shall be the State of California Action Level of 12 ppb.

b. Soil: Soil concentrations of MTBE shall be reduced to a level that will not cause leaching of MTBE to groundwater above a concentration of 5 ug/l.

c. Soil gas: Shallow soil gas concentrations of TPHg and Benzene shall be reduced to below 10,000 ug/m^3 and 84 ug/m^3, respectively, to prevent excessive health risk to a future residential receptor from potential indoor-air impacts.

13. **Basis for 13304 Order**: The dischargers have caused or permitted waste to be discharged or deposited where it is or probably will be discharged into waters of the State and creates or threatens to create a condition of pollution or nuisance.

14. **CEQA**: This action is an order to enforce the laws and regulations administered by the Board. As such, this action is categorically exempt from the provisions of the California Environmental Quality Act (CEQA) pursuant to Section 15321 of the Resources Agency Guidelines.

IT IS HEREBY ORDERED, pursuant to Section 13304 of the California Water Code, that the dischargers (or their agents, successors, or assigns) shall cleanup and abate the effects described in the above findings as follows:

A. PROHIBITIONS

1. The discharge of wastes or hazardous substances in a manner that will degrade water quality or adversely affect beneficial uses of waters of the State is prohibited.

2. Further significant migration of wastes or hazardous substances through subsurface transport to waters of the State is prohibited.

3. Activities associated with the subsurface investigation and cleanup that will cause significant adverse migration of wastes or hazardous substances are prohibited.

B. TASKS

1. **SOIL AND WATER INVESTIGATION**

COMPLIANCE DATE: September 17, 2004

Submit a technical report acceptable to the Executive Officer documenting completion of Tasks 1 through 4 proposed in the *Revised Work Plan*, dated January 27, 2004, prepared by Stratus Environmental, Inc. (Stratus), and approved in the SCVWD letter dated February 24, 2004, and that addresses the items in the District's June 2, 2004 letter. The proposed tasks include installation, monitoring, and sampling of one additional monitoring well (MW-35) in the vicinity of the former UST complex, and proper destruction of three off-site nested groundwater monitoring wells (MW-11/12, MW-13/14, and MW-15/16) that have consistently shown nondetectable hydrocarbon concentrations. The technical report should include iso-concentration contour maps down to concentrations at or below the preliminary cleanup goals listed in finding 12, all historical soil, soil vapor (including results of a confirmation soil vapor sampling per the District request dated June 2, 2004), and groundwater data in tabulated form, a table indicating all observations of free product, a site conceptual model, and present the well construction details and updated cross-sections.

Additional work may be required following review of the requested report. Any work plan requested shall be submitted within 30 Days of the request unless otherwise agreed upon in writing. Any requested reports shall be due 60 Days following approval of the work plan unless otherwise agreed upon in writing.

2. **CORRECTIVE ACTION PLAN**

COMPLIANCE DATE: October 22, 2004

Submit a Corrective Action Plan acceptable to the Executive Officer containing:

a. A summary of the site history, site hydrogeology, and contaminant distribution
b. Evaluation of the ongoing interim remedial actions
c. Feasibility study evaluating alternative final remedial actions
d. Recommended final remedial actions and cleanup standards
e. Implementation tasks and time schedule

Item c should include projections of cost, effectiveness, benefits, and impact on public health, welfare, and the environment of each alternative action.

Items a through c should be consistent with the guidance provided by Subpart F of the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR Part 300), CERCLA guidance documents with respect to remedial investigations and feasibility studies, Health and Safety Code Section 25356.1(c), and State Board Resolution No. 92-49 as amended ("Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304").

Item d should consider the preliminary cleanup goals for soil and groundwater identified in finding 12 and should address the attainability of background levels of water quality (see finding 11).

3. **IMPLEMENTATION OF CORRECTIVE ACTION**

COMPLIANCE DATE: March 4, 2005

Submit a report acceptable to the Executive Officer documenting implementation of the Corrective Action Plan. Implementation of the Corrective Action Plan shall include the following activities:

a. Preparation and submittal of a remedial system design package that include engineering diagram of the system and its components, equipment specifications, and a diagram showing the site layout.
b. Preparation and submittal of all permitting documents necessary for installation and operation of the remedial system.
c. Installation and start-up of the remedial system.
d. Submittal of a start-up report acceptable to the executive officer.
e. The remedial system shall be operated and maintained on a regular basis. The system shall be maintained with the goal of 90 percent operational.

4. **SITE STATUS REPORTS**

COMPLIANCE DATE: September 10, 2004, and the 10th day of every month, thereafter, until the final remediation system is started up.

Submit Site Status Reports acceptable to the Executive Officer. The status reports should include brief descriptions of the work completed since the prior status report and the work planned for the following month.

5. **GROUNDWATER AND REMEDIAL SYSTEM MONITORING AND REPORTING**

COMPLIANCE DATE: 30 days after the end of each quarter (January 30, April 30, July 30, and October 30)

Submit Quarterly Monitoring and Remediation Reports acceptable to the Executive Officer. The required elements of these reports are included in the attached Self Monitoring Program.

6. **DELAYED COMPLIANCE**: If the dischargers are delayed, interrupted, or prevented from meeting one or more of the completion dates specified for the above tasks, the dischargers shall promptly notify the Executive Officer and the Board may consider revision to this Order.

C. PROVISIONS

1. **No Nuisance**: The storage, handling, treatment, or disposal of polluted soil or groundwater shall not create a nuisance as defined in California Water Code Section 13050(m).

2. **Good Operation and Maintenance (O&M)**: The dischargers shall maintain in good working order and operate as efficiently as possible any facility or control system installed to achieve compliance with the requirements of this Order.

3. **Access to Site and Records**: In accordance with California Water Code Section 13267(c), the dischargers shall permit the Board or its authorized representative:

   a. Entry upon premises in which any pollution source exists, or may potentially exist, or in which any required records are kept, which are relevant to this Order.

   b. Access to copy any records required to be kept under the requirements of this Order.

   c. Inspection of any monitoring or remediation facilities installed in response to this Order.

   d. Sampling of any groundwater or soil which is accessible, or may become accessible, as part of any investigation or remedial action program undertaken by the dischargers.

4. **Self-Monitoring Program**: The dischargers shall comply with the Self-Monitoring Program as attached to this Order and as may be amended by the Executive Officer.

5. **Contractor/Consultant Qualifications**: All technical documents shall be signed by and stamped with the seal of a California registered geologist, a California certified engineering geologist, a California certified hydrogeologist, or a California registered civil engineer.

6. **Lab Qualifications**: All samples shall be analyzed by State-certified laboratories or laboratories accepted by the Board using approved EPA methods

for the type of analysis to be performed. All laboratories shall maintain quality assurance/ quality control (QA/QC) records for Board review. This provision does not apply to analyses that can only reasonably be performed on-site (e.g. temperature).

7. **Document Distribution**: Copies of all correspondence, technical reports, and other documents pertaining to compliance with this Order shall be provided to the following agencies:
   a. Santa Clara Valley Water District: Attention George Cook
   b. Regional Water Quality Control Board: Attention: Barbara Sieminski
   c. Santa Clara County Department of Environmental Health: Attention Gordon McPhaill

   The Executive Officer may modify this distribution list as needed.

8. **Reporting of Changed Owner or Operator**: The dischargers shall file a technical report on any changes in site occupancy or ownership associated with the property described in this Order.

9. **Reporting of Hazardous Substance Release**: If any hazardous substance is discharged in or on any waters of the State, or discharged or deposited where it is, or probably will be, discharged in or on any waters of the State, the dischargers shall report such discharge to the Board by calling (510) 622-2300 during regular office hours (Monday through Friday, 8:00 to 5:00).

   A written report shall be filed with the Board within five working days. The report shall describe: the nature of the hazardous substance, estimated quantity involved, duration of incident, cause of release, estimated size of affected area, nature of effect, corrective actions taken or planned, schedule of corrective actions planned, and persons/agencies notified.

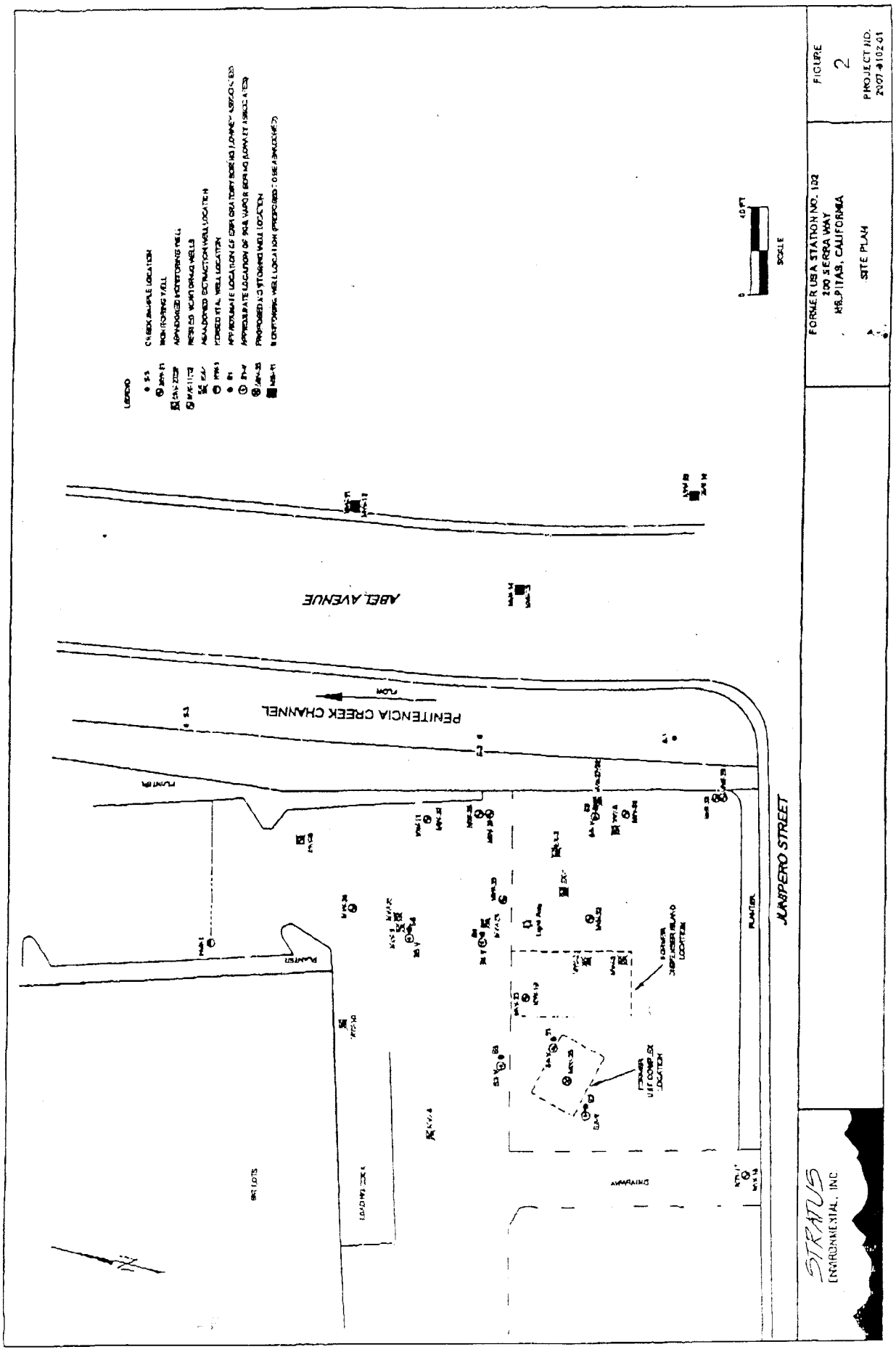
   This reporting is in addition to reporting to the Office of Emergency Services required pursuant to the Health and Safety Code.

August 11, 2004
Date

Bruce H. Wolfe
Executive Officer

FAILURE TO COMPLY WITH THE REQUIREMENTS OF THIS ORDER MAY SUBJECT YOU TO ENFORCEMENT ACTION, INCLUDING BUT NOT LIMITED TO: IMPOSITION OF ADMINISTRATIVE CIVIL LIABILITY UNDER WATER CODE SECTIONS 13268 OR 13350, OR REFERRAL TO THE ATTORNEY GENERAL FOR INJUNCTIVE RELIEF OR CIVIL OR CRIMINAL LIABILITY

Attachments: Site Map
Self-Monitoring Program


LEGEND
SCALE
40FT
ABEL AVENUE
PENITENCIA CREEK CHANNEL
JUNIPERO STREET
FORMER USA STATION NO. 132
200 SERRA WAY
HILLPITAS, CALIFORNIA
SITE PLAN
FIGURE
2
PROJECT NO.
2007-102-01
STRATUS
ENVIRONMENTAL, INC.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

SELF-MONITORING PROGRAM FOR:

USA PETROLEUM CORPORATION, GEORGE DONOVAN

for the property located at

200 Serra Way
MILPITAS, SANTA CLARA COUNTY

1. **Authority and Purpose**: The Board requests the technical reports required in this Self-Monitoring Program pursuant to Water Code Sections 13267 and 13304. This Self-Monitoring Program is intended to document compliance with Cleanup and Abatement Order No. R2-2004-0066.

2. **Monitoring**: The dischargers shall measure groundwater elevations quarterly in all monitoring wells and shall collect and analyze representative samples of groundwater according to the schedule in the following table.

Self-Monitoring Schedule for the Site at 200 Serra Way, Milpitas, California

Well #	Sampling Frequency	Analyses	Well #	Sampling Frequency	Analyses
MW-17	SA	8015B/8260B	MW-18	A	8015B/8260B
MW-19	SA	8015B/8260B	MW-20	SA	8015B/8260B
MW-21	Q	8015B/8260B	MW-22	SA	8015B/8260B
MW-25	Q	8015B/8260B	MW-26	Q	8015B/8260B
MW-29	A	8015B/8260B	S-1*	SA	8015B/8260B
MW-31	Q	8015B/8260B	S-2*	SA	8015B/8260B
MW-32	Q	8015B/8260B	S-3*	SA	8015B/8260B
MW-33	Q	8015B/8260B	HW-1	SA	8015B/8260B
MW-34	SA	8015B/8260B			

Key: Q = Quarterly SA = Semi-Annual A = Annual
8015B = Total Petroleum Hydrocarbons as Gasoline/Diesel by EPA Method 8015B or equivalent
8260B = Benzene, Toluene, Ethylbenzene, total Xylenes, and Fuel Oxygenates by EPA Method 8260B or equivalent; must have detection limit of 0.5 ug/l for MTBE
* Sample collected from Penitencia Creek

The dischargers shall sample any new monitoring or extraction wells quarterly, and analyze groundwater samples for the same constituents as shown in the attached table. The dischargers may propose changes in the attached table; any proposed changes are subject to Executive Officer approval.

3. **Quarterly Monitoring Reports**: The dischargers shall submit quarterly monitoring reports to the Board no later than 30 days following the end of the quarter (e.g. report for first quarter of the year due April 30). The first quarterly monitoring report subject to this order shall be due on October 30, 2004. These data shall also be included in the quarterly monitoring reports.

   a. Transmittal Letter: The transmittal letter shall discuss any violations during the reporting period and actions taken or planned to correct the problem. The letter shall be signed by the dischargers' principal executive officer or his/her duly authorized representative, and shall include a statement by the official, under penalty of perjury, that the report is true and correct to the best of the official's knowledge.

   b. Groundwater Elevations: Groundwater elevation data shall be presented in tabular form, and a groundwater elevation map should be prepared for each monitored water-bearing zone. Tabulated information shall include current depth to water, wellhead elevation, calculated groundwater elevation, well construction details, and an assessment of whether the screens are submerged. The map shall show all monitoring and remediation wells, the groundwater flow direction, gradient, and flow rose diagram. Historical groundwater elevations shall be included in the fourth quarterly report each year.

   c. Groundwater Analyses: Groundwater sampling data shall be presented in tabular form, and isoconcentration maps and time-trend plots shall be prepared for TPHG, Benzene, and MTBE for each monitored water-bearing zone. The report shall indicate the analytical method used, detection limits obtained for each reported constituent, and a summary of QA/QC data. The report shall describe any significant increases in contaminant concentrations since the last report, and any measures proposed to address the increases. Supporting data, such as lab data sheets, need not be included. Historical groundwater sampling results shall be included in the fourth quarterly report each year.

   d. Groundwater Extraction: If applicable, the report shall include groundwater extraction results in tabular form, for each extraction well and for the site as a whole, expressed in gallons per minute and total groundwater volume for the quarter. The report shall also include contaminant removal results from groundwater extraction wells, and from other remediation systems (e.g. soil vapor extraction), expressed in units of chemical mass per day and mass for the quarter, and tabulated influent and effluent analytical data for the treatment systems. In addition, the report shall include

information about the amount of remedial system downtime, including the causes of the shutdowns, and information about any significant modifications or additions made to the system, reasons for the changes, and modification of the As-Built Drawings. Historical mass removal results, and time-trend plots for TPHG, Benzene and MTBE concentrations in remedial system influent shall be included in the reports.

e. Status Report: The quarterly report shall describe relevant work completed during the reporting period (e.g. site investigation, interim remedial measures) and work planned for the following quarter.

4. **Electronic Reporting:** Assembly Bill 2886 (enacted as Chapter 727, Statutes of 2000 on September 27, 2000) calls for the SWRC to adopt emergency regulations concerning electronic submission of reports. The emergency regulations (Water Code Sections 13195-13198) require persons to ensure electronic submission of laboratory data (i.e. soil or water chemical analysis) via the Internet to the SWRCB's GeoTracker database. Beginning September 1, 2000, electronic submission of laboratory data is required. Beginning January 1, 2002, any person submitting laboratory data in electronic format pursuant to these regulations shall specify for the location where the analyzed sample was collected: 1) the latitude and longitude of groundwater monitoring wells accurate to within one meter, and 2) the surveyed elevation relative to mean sea level of any groundwater monitoring well sampled. Locational data will be best collected with a survey grade GPS unit with submeter accuracy.

All reports shall be submitted in electronic format "optimized" (optimized for viewing over the web) pdf files and contaminant information provided in electronic spreadsheet format. Signature pages and perjury statements should be included and must have either original or electronic signature. (Alternatively, the paper copy of the signature page and perjury statement can be mailed separately).

5. **Violation Reports:** If the dischargers violate requirements in the Cleanup and Abatement Order, then the dischargers shall notify the Board office by telephone as soon as practicable once the dischargers have knowledge of the violation. Board staff may, depending on violation severity, require the dischargers to submit a separate technical report on the violation within five working days of telephone notification.

6. **Other Reports:** The dischargers shall notify the Board in writing prior to any site activities, such as construction or underground tank removal, which have the potential to cause further migration of contaminants or which would provide new opportunities for site investigation. Additionally, the dischargers shall notify the Board within 5 days of receiving monitoring well data showing MTBE at more than twice the previous sampling result for that well.

7. **Record Keeping**: The dischargers or their agents shall retain data generated for the above reports, including lab results and QA/QC data, for a minimum of six years after origination and shall make them available to the Board upon request.

8. **SMP Revisions**: Revisions to the Self-Monitoring Program may be ordered by the Executive Officer, either on their own initiative or at the request of the dischargers. Prior to making SMP revisions, the Executive Officer will consider the burden, including costs, of associated self-monitoring reports relative to the benefits to be obtained from these reports.

August 11, 2004
Date

Bruce H. Wolfe
Executive Officer

PROOF OF SERVICE

I, Rosalie Kirston, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On September 17, 2004, I served a copy of the within document(s):

USA PETROLEUM CORPORATION'S PETITION FOR RESCISSION OF CLEANUP AND ABATEMENT ORDER NO. R2-2004-0066; REQUEST FOR STAY PENDING HEARING; REQUEST FOR HEARING

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☒ by placing the document(s) listed above in a sealed overnight delivery envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a overnight delivery agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Bruce H. Wolfe
Executive Officer
California Regional Water Quality
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Office of Chief Counsel
1001 "I" Street, 22nd Floor
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Senior Staff Counsel
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same

day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 17, 2004, at Los Angeles, California.

Rosalie Kirston

Rosalie Kirston